Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No.: 78-667

CAROL AMEND

Petitioner,

—*vs*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CAROL AMEND,

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—vs—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Carol Amend, seeks to have this Court issue its Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, to review the decision of that Court affirming the conviction of Petitioner which occurred before the United States District Court for the Southern District of Mississippi.

OPINION BELOW

The decision of the Court of Appeals, Fifth Circuit, which affirmed Petitioner's conviction was by virtue of a non-published opinion which is contained in the Appendix to this Petition at A.1-3. A timely Petition for Rehearing was denied on 21 August 1978, a copy which appears in the Appendix at A.4-5. A Stay of Mandate has been ordered by the Appeals Court for and during these certiorari proceedings, a copy of the stay is attached and appears at A.6.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on 6 July 1978. A timely Petition for Rehearing was denied on 21 August 1978. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked pursuant to Title 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. WHERE THE PETITIONER IS CHARGED WITH CONSPIRACY TO DISTRIBUTE AND TO POSSESS WITH INTENT TO DISTRIBUTE MARIJUANA, DOES SHE LACK STANDING TO CHALLENGE THE SEARCH OF A VEHICLE WHOSE CONTENTS CONSTITUTE THAT EVIDENCE WHICH IS THE SUBJECT OF AND ESSENTIAL TO A CONVICTION ON SAID CHARGE WHEN SAID PETITIONER WAS NOT PRESENT AT THE TIME OF THE SEARCH OR FOUND BY THE COURT TO HAVE AN "INTEREST" IN SAID VEHICLE YET SAID "INTEREST" IS FOUND TO BE SUFFICIENT FOR A CONSPIRACY CONVICTION?

2. WHERE NO EVIDENCE IS INTRODUCED TO ESTABLISH THE PETITIONER EVER ENTERED INTO AN AGREEMENT OR DID ANY ACT TO KNOWINGLY FURTHER THE OBJECTIVES OF A CONSPIRACY, BUT IT IS SHOWN TO HAVE BEEN GENERALLY PRESENT AT THE GEOGRAPHICAL AREA WHERE THE OFFENSES ARE SAID TO HAVE OCCURRED AND POSSIBLY TO HAVE OBSERVED SOME ACT OR ACTS OF THE CONSPIRATORS, IS THAT EVIDENCE SUFFICIENT TO SUSTAIN THE CONVICTION OF THE PETITIONER?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. HISTORY

The Petitioner was indicted, along with sixteen (16) co-

defendants in a two (2) count Indictment, the first count charging a conspiracy to import marijuana and the second count charging a conspiracy to distribute and possess with intent to distribute marijuana. Subsequently, the Petitioner entered a plea of not guilty and filed a Motion to Adopt the Motion to Suppress filed by co-defendant, Thomas Swann. Swann's Motion being to suppress the marijuana taken from a U-Haul truck that Swann was operating. The Trial Court granted the defendant's Motion and subsequently an Order denying the Motion to Suppress was entered.

The matter came on for trial before a jury, wherein the Government offered three witnesses; a co-defendant and two agents of the Mississippi Bureau of Narcotics. The jury returned a verdict of guilty on both counts, her conviction was thereafter appealed and affirmed.

B. FACTS

Petitioner was demonstrated by the evidence to have asked co-defendant, Girtman, to accompany her and two other persons with his boat and another boat to the gulf coast of Mississippi where the boats were to be used. Until arrival, the witnesses as well as the defendant were without knowledge of the exact use of the boat to precisely what was to be done. After arrival Girtman allegedly learned of the plans and joined therein. Girtman did not testify that the Petitioner learned the same facts. Girtman testified that he and three other co-defendants (the Petitioner *not* being one) used his boat to bring bales of what he believed to be marijuana from a ship to the gulf coast shore. No evidence was shown that the Petitioner did anything to assist therein was adduced nor was evidence adduced to show she learned that the charged conspiracy or joined therein. At the time the above activities allegedly occurred (relating to the conspiracy charged in count one of the Indictment) the defendant was demonstrated to have been on the gulf coast and may have been in a position to have been able to partially see some of the activities of the co-defendants but was never demonstrated to have entered any agreement at any

time charged or for any purposes charged.

As to the second count of the Indictment, the Petitioner was not placed in or near the marijuana referred to nor shown to have seen or even known of its existence and never was testified to as having agreed to anything touching thereon. Specifically, the testimony indicated that the Petitioner was last seen many days before the date of the search of Swann's vehicle on the gulf coast and a great distance from the alleged marijuana discovered in Wayne and Clark Counties, Mississippi.

The facts surrounding the actual search of Swann's vehicle are not herein presented, as the lower Appellate Court did not reach the merits of Petitioner's Motion to Suppress.

The trial ended with Petitioner being found guilty by jury verdict. Appeal and affirmance of the conviction followed.

REASONS FOR GRANTING THE WRIT

1. The Petitioner, being charged with conspiracy to distribute and to possess with the intent to distribute marijuana has standing to challenge the validity of the search of the vehicle whose contents constituted that evidence which was the subject of an essential to Petitioner's conviction on that charge although she was not present when the search occurred and was found by the Court to have no "interest" in the vehicle.

The lower Appellate Court, affirmatively found that Petitioner had no standing to raise the Fourth Amendment challenge to the search of the rented van from which the contraband being the subject of count two of the Indictment was predicated. The Fifth Circuit Court of Appeals held:

> "Defendant was not present when Swann's van was searched, she had no legitimate interest in the truck or its contents and was not charged with an offense that includes, as an essential element, possession of the seized evidence at the time of the contested search and seizure." (A.1-2)

Petitioner, however, contends that without *that* marijuana, there was *no* marijuana at all that *could* have been offered in the prosecution of count two of the Indictment.

So simply stated, the lower Appellate Court found that Petitioner was in no way connected with the van or its contents, but that van and its contents constituted *that evidence* essential to convict her under count two, and no other such evidence exists anywhere. As the Petitioner in count two, was charged with conspiring to distribute and *to possess* with the intent to distribute that marijuana seized from the van driven by Swann, the Court could not consistently find that Petitioner was not connected with the marijuana to enable her to seek to suppress it, but was nevertheless connected with it to the extent that her conviction could be sustained in the same case.

The decision, sought to be reviewed, is in direct and patent conflict with this Court's decision in *Jones v. United States*, 362 U.S. 672 (1959). In that case, this Court stated:

> "In cases where the Indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a Motion to Suppress evidence prior to trial."

The lower Appellate Court relied on this Court's decision in *Brown v. United States*, 411 U.S. 223 (1973) in support of its position that the Petitioner lacks standing to challenge the Motion to Suppress. Said case is distinguishable from the instant case in that the conspiracy charge therein was predicated upon activities which occurred prior to the time of the search that was challenged. In the instant case, without the purported contraband seized from defendant Swann's vehicle, there would be no marijuana upon which count two of the Indictment could be founded. At no time, was the Petitioner ever seen in possession of marijuana, and the fact that she was merely charged with "conspiracy to possess" does not alter the fact that there must be contraband upon which the charges founded. Petitioner maintains that the instant case involves a question "where possession at the time of the contested search and seizure is 'an

essential element of the offense. . .charged' *Simmons v. United States*, 390 U.S. 377, 390 (1968)". *Brown v. United States*, 411 U.S. at 229. In the instant case like *Jones*, the Government's case depended upon some possession of the seized evidence at the time of the contested search and seizure. To contend that the defendant had to demonstrate a possessory interest in either the vehicle or the contraband would place the Petitioner in an untenable position. It has been held, that a criminal defendant will be found not to have standing to contest a search and seizure where the defendant:

> "(A) Were not on the premises at the time of the contested search and seizure; (B) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. at 229.

Instantly, the problem of allowing the Government to allege possession as part of the crime charged yet deny that the Petitioner had possession sufficient for standing purposes is present. Had the defendant admitted a possessory interest in the contraband, it would place the Government at an unfair advantage for in order to gain standing, the defendant would have to admit possession. Petitioner is aware that the "automatic" standing as created in the *Jones* decision has been altered by subsequent decisions of this Court. See: *Simmons v. United States*, supra. However, in the instant case such standing should have been afforded the Petitioner for there was a definite risk to the Petitioner of "either self-incrimination or prosecutorial self-contradiction". *Brown v. United States*, supra.

Additionally, Petitioner would point out to this Court, that in upholding the sufficiency of the evidence upon which her conviction was predicated, the Court found that the defendant had a sufficient "interest" in vehicles in which marijuana was not found, to sustain her conviction. It is difficult, to say the least, to comprehend how the Court could find that the Petitioner lacks standing to raise the validity of the search but

was then found to have had a sufficient interest upon which to predicate the conviction.

Petitioner maintains that the lower Appellate Court, using evidence unsupported by the record, nevertheless sustained the Petitioner's conviction for a conspiracy to possess marijuana based upon "evidence" which the Court found the Petitioner had no interest in. The Court apparently found the Petitioner was not connected with *that* marijuana to enable her to seek to suppress it but connected her to it with sufficient "evidence" to sustain her conviction in the same case. The Court apparently found facts against the defendant which are not supported by the record and apparently found inconsistently that the defendant was in no way connected with the marijuana seized in Clark County, Mississippi (so that she had standing to move to suppress) but was so connected with it to sustain a conviction for conspiring to possess the same marijuana with intent to distribute the same. The evidence upon which the Motion to Suppress was directed was that evidence essential for the Petitioner's conviction and thus standing should have been conferred. On this basis, the Petitioner maintains that review of the lower Court decision is mandated for, if the only testimony of marijuana was left to those vague references made by co-defendant Girtman, the first witness for the Government who specifically stated he carried bales of what *he believed* to be marijuana, no Court could sincerely assert that conviction of the Petitioner was assured. The spill-over effect of the only, tangible asserted-marijuana, which should have been suppressed, is patently obvious to show standing prejudicial to the rights of the Petitioner as to a fair trial and due process of law as guaranteed by the Constitution. On this basis, Petitioner maintains that review of the lower Appellate decision is mandated and a reversal required.

> 2. When there is no evidence introduced to establish that the Petitioner ever entered into an agreement or did any act to knowingly further the objectives of a conspiracy but it is shown to have been generally

> present at the geographical area where the offenses are said to have occurred and may have possibly observed some act or acts of the conspirators, the evidence is insufficient to sustain the conviction of of the Petitioner.

The lower Appellate Court, in holding in the instant case that the evidence was sufficient to sustain the conviction of the Petitioner (A.1-2), asserted, that ". . .two of the vehicles employed to transport the marijuana also belonged to (the Petitioner)." However, Petitioner maintains that there was no evidence to establish that any of her vehicles transported marijuana. The evidence established that they were operated by persons charged in the conspiracy, however, no marijuana was ever found within them. Moreover, the testimony indicated that the Petitioner, *and* Fred Fillingham, owned the vehicles, but, that legal title was in the name of the Petitioner. The vehicles were observed, at all times material to the Indictment, to be operated by others, and *not* the Defendant.

Petitioner further maintains that all of the evidence showed that she did *nothing* to connect her with a conspiracy to possess with the intent to distribute marijuana, even if, the other count (conspiracy to import marijuana) was determined to exist. The record, is totally devoid of all indication that the Petitioner agreed or conspired to anything relating to possessing or distributing the alleged marijuana. The gross inferences, which the Court of Appeals apparently held to create the fact is but sheer inference and cannot clearly, support the instant conviction, for, it was not based upon evidence beyond and to the exclusion of every reasonable doubt. Hence, a clear violation of the Petitioner's due process rights has been established requiring this Court to invoke its certiorari jurisdiction.

In the instant case, the evidence against the Petitioner primarily was developed by Government witness, Charles Girtman. Girtman was a co-defendant in the case and pled guilty to a lesser included (misdemeanor) offense. He testified that he accompanied the Petitioner, bringing his boat with him

but did not know just what he was going to do or how he was going to use the boat. While the witness was riding in the company of one, Anita Prince, a named co-defendant, the defendant was riding with another. The vehicles traveled together part of one day and became separated meeting the following day.

The witness stated that he had a conversation with Fred Fillingham (a known co-defendant); however, no one else was present to hear the conversation which dealt with finding a place to "unload a large quantity of marijuana with small boats"). Girtman testified that he desired to remain isolated from any others, and actually did not know what, if anything, anyone else was to do; he was not sure he was going to enter into and become a part of the endeavor as well. The only conversation that this witness had with Petitioner during the trip from Florida to Mississippi was to learn the name of the motel that they were to meet in and there they would learn what "role" they might play and whatever had been planned. At this point, Girtman stated he felt the Defendant and the others in his entourage *did not* know what was to take place.

Subsequently, the witness, in Mississippi, talked with and accompanied Fillingham in a search for a "place" to land the boats. Thereafter, the "plan" was talked about between the witness and Fillingham without others being allowed to hear the same. Later that night, the witness and others went out to search for a freighter.

On one occasion, the witness was taken to a house in which Anita Prince was staying. The witness attributed the remark to the defendant that the house was where they were to bring in marijuana, store it or move it from there; however, the term "they" was never defined to either include or exclude the defendant.

Subsequently, Girtman testified, that he and another went in his boat to a freighter, loaded his boat, at which time the other boat was also at the freighter and being crewed by others not the Petitioner. The witness later stated that he saw the defendant on the dock when he unloaded, but never saw any "cargo" being unloaded on the dock.

Over objection, Girtman was permitted to repeatedly

relate conversations had with persons other than the Petitioner, this though it was never shown the Petitioner was a party, directly or indirectly to those conversations in any way or even knew they occurred or the content of the conversations.

Girtman testified that he left his boat with other co-defendants after being paid Seven Thousand Five Hundred ($7,500.00) Dollars. Girtman testified that Petitioner was "present" in the building but not that she heard or understood or participated in that transaction in any way. The witness further stated that prior to leaving Mississippi the Petitioner called him and assertedly said "we might have something for you to use your boat for" but did not further design the circumstances.

On cross-examination, Girtman admitted that he had negotiated a plea with a Government recommendation that he would receive probation for a misdemeanor, and that in the event the circumstances might affect his flying license, that the Government would intercede favorably on his behalf. Moreover, it should be noted that the witness's boat came back to him. On cross-examination, the witness further stated that he had known the Petitioner for some years (two years on direct testimony - three or four years on cross); he knew that she was in the aquarium business and needed to use a boat in connection therewith, acknowledged that he had made amorous advances toward her and was rejected by her, and was uncertain if she was a friend though at one time she was, of course. Girtman further stated that part of his negotiations included that he would appear and testify against the Petitioner, Carol Amend, at her trial.

The cross-examination further indicated that when the Petitioner mentioned the using of the boat belonging to Girtman, she never stated to him for what purpose; he did not ask the purpose and did not think the defendant knew the use - purpose of the boat. They never discussed the reason or purpose. Moreover, before arriving at the Mississippi gulf coast, neither the witness nor the Petitioner knew exactly where they were going.

All events that happened in Pascagoula, Mississippi, were learned about by the witness from Fred Fillingham. On all

"boat trips" the Petitioner was not present.

The Government witness testified to more "inferences" but had no definite activities of the Petitioner for which he could testify to. While Girtman said he saw the Petitioner on the dock where he unloaded the bales which he believed to be marijuana, he further stated that she did *nothing* to or with the bales, she only spoke with the witness.

The second Government witness to testify, Ronald E. Johnson, an agent for the Mississippi Bureau of Narcotics, stated that he saw the Petitioner at the Biloxi Small Craft Harbor on 4 December 1975, on or about 3:30 P.M. He took pictures of her which were, over objection, admitted into evidence. One picture was taken as she left the Harbor Masters office, another was "basically the same" while a third one was a picture of her as she was going up the steps into the office. The remaining pictures were those of the co-defendants and them repairing their boats. He testified that Petitioner spoke with the co-defendants who were fueling the vessel and to the Harbor Master; that was the only occasion he had seen or talked to either co-defendant. Thereafter she drove on Highway 90 to Biloxi, Mississippi.

This witness testified that subsequently (on 10 December 1976) he saw a Cigarette boat and found about an ounce of "green vegetable looking material" and various items. Later that day, he saw the vehicle the Petitioner had been driving, but another female was operating it. He could not identify her. The witness had obtained certified copies of the registration of the vehicle which reflected the owner's name as that of the Petitioner, the registration of the boat reflected the same, and these were introduced over the objection of Petitioner.

Upon cross-examination, the witness stated that the one observation of defendant, on 4 December 1975, was his only observation of her. He saw her do nothing more than the matters mentioned above; he admitted that he only concluded she went to a certain hotel and did not even know that. He admitted he had no way of knowing what the Petitioner may have conversed about with the persons working on the boat.

The third and last Government witness to testify was Fred

Lovett, who also worked for the Mississippi Bureau of Narcotics. As a result of a telephone conversation, the agent had gone from Hattiesburg to Waynesboro, Mississippi, to look for two vehicles, one a white four-door Cadillac and one a green over yellow Torino. He located the white Cadillac in Waynesboro some thirty to forty minutes later. After surveilling the Cadillac for awhile, the agent left to eat and returned to find the green Torino parked. The agent testified that the surveillance continued and that he was looking for Tom Swann (or Gilbert) and Honorio; they were located in the downtown at Waynesboro. These co-defendants entered the Torino and met with a GMC camper. The agent testified of the activities of the U-Haul driven by Swann, and the GMC. A warrant was subsequently obtained for the U-Haul (this "search" is the subject of Point One) and stated that upon executing the search warrant he found some "thirteen thousand some odd pounds" of "green vegetable like substance" which "appeared to be marijuana". The Petitioner was not in the truck.

Upon cross-examination, the witness revealed that while in Waynesboro he had been given a specific description of the Petitioner, Carol Amend, although at first, he attempted to deny this. He finally acknowledged such did occur and that he was especially looking for the person of the Petitioner but he never saw her in either Waynesboro or in any of the vehicles. Moreover, the witness testified he never saw anyone who could be confused with the Petitioner in connection with the vehicles or the parties observed to be using them. He had never seen the Petitioner until in Court in connection with the case.

The witness Girtman testified that Petitioner was living with Fred Fillingham, who was acknowledged to be a demanding person always giving orders to others. Although the naked paper work reflected the Petitioner to be the registered owner of the boat, the old white Cadillac and the GMC camper, what interest was held by the man, Fred Fillingham, with whom the Petitioner lived, is nowhere touched upon by the testimony other than the testimony of the main Government witness Girtman, who expressed his belief that both the vehicles and boat belonged to *both* the Petitioner and Fillingham. At another place in the record he referred to the boat as being

Fillingham's.

The record is wholly devoid of any indication of *who* communicated with the Petitioner in order to cause her to go from her home in Florida to Mississippi, and it is equally wanting to establish what, if anything, she was told of the marijuana conspiracy charged in the Indictment. Girtman specifically testified that he did not know what he was going to do or how he was going to use this boat and did not believe the Petitioner did either. Clearly, there was no testimony to attribute to the Petitioner any circumstances which reflect her to have been any better informed than the witness Girtman. As a matter of fact, the witness opined that the Petitioner did not know the use to which the boats were to be put.

It was not until after Girtman arrived in Mississippi and following a private conversation he had with Fillingham alone, that he first learned what was going on and what part he would play. Girtman never testified the Petitioner was present or otherwise in such a position to learn of the agreement, the conspiracy and to become part of it. No evidence was offered of the Petitioner having done anything after she was in Mississippi, even if it be assumed that she somehow learned of what was afoot. No action on her part in advancing the "conspiracy" or the like is included in the record. Petitioner was never demonstrated to have *agreed* to do anything in connection with the charged offenses.

It is well established, that with respect to conspiracy offenses the statements of co-conspirators made during the conspiracy and in furtherance thereof are admissible against all the conspirators. However, before the same are admissible against one on trial it need be first established that there was an agreement and that the accused, the defendant, became a part of *that* agreement. See: *United States v. Menichino,* 497 F.2d 935 (5th Cir. 1974); *United States v. Carlton,* 475 F.2d 104 (5th Cir. 1973). The defendant need not know every minute detail of the plan or agreement, but must know enough of it to know generally what unlawful activity is planned and then, after knowing, must intentionally join into the conspiracy in some manner. See: *United States v. Harvey,* 464 F.2d 1286 (5th Cir. 1972); Cert. denied 410 U.S.938.

Assuming arguendo the Petitioner knew no more than the witness Girtman, while traveling to the gulf coast, she could not then have been a member of any conspiracy for she did not know what was to be done, who was to do it or how it was to be accomplished. There is no evidence to establish anything further than the foregoing assumption. It must be remembered that it was only after Girtman conversed with Fillingham that he was informed of enough to be able to determine a course of action to join or not join in the conspiracy.

The Government only established in light of the testimony most favorable to the Government, that the Petitioner was *present* on the same dock where the witness Girtman unloaded a number of bales of what he believed to be marijuana. Mere presence at the scene is, however, not adequate proof to convict, even if the Petitioner had knowledge of the crime as being commmitted; the Court so charged the jury and that is the correct statement of the law. See: *Roberts v. United States,* 416 F.2d 1216 (5th Cir. 1969). Girtman specifically testified Petitioner did nothing more there than to converse with him but he did not state what the conversation related to and more particularly said nothing to indicate their discussion touched upon the subject matter of the alleged conspiracy so as to embrace the Petitioner. The testimony of second witness Johnson holds little more for the Government to rest its case upon. He could not know or hear the subject matter of the Petitioner's conversation with the Harbor Master nor the two persons she was seen speaking to. Other than his daylight observation on 4 December 1975, he never saw the Petitioner or knew of her whereabouts. He could shed no further light upon the Petitioner or her actions other than seeing her in the harbor.

The third witness's testimony in a similar capsule, reveals even less than the second witness. Although he had the specific description of the Petitioner and was especially looking for her he never saw her. No witness testified that the defendant was ever in Waynesboro, Mississippi. Moreover, Lovett testified that no expert ever testified that the "thirteen hundred some odd pounds" of a green vegetable like substance" which "appeared to be marijuana" was in fact the same as no expert ever testified to that.

There was no effort by the Government to show that the U-Haul truck or its contents came from a gulf coast or had any connection with the episodes testified to by Girtman as having occurred on or before 4 December 1975, on the coast. Such must be wholly presumed. Moreover, there is nothing to indicate that the Petitioner ever saw the contents of the truck or for that matter had the slightest knowledge of their existence as such was never introduced, including particularly any facts that the Petitioner was ever a party to any agreement touching on those contents. No other testimony is there to support the allegations of count two. All that evidence does exhibit, is that an old, white Cadillac which was registered in the name of the Petitioner and driven by another co-defendant was found in Waynesboro. The testimony indicated that the Petitioner was never shown to have done anything with the vehicle. Additionally, the GMC truck which was registered in her name and driven by her or Sam Firestone from Miami to the gulf coast was seen in Waynesboro. However, apparently from the time the Petitioner arrived in Mississippi the truck was taken over by another since she was *never* seen to drive it but rather another and different vehicle which in turn was last seen in the possession of a yet unidentified female. Pointedly, the GMC truck was seen to be used for nothing unlawful but transportation to Waynesboro and was then driven by Fillingham only.

In short, the entire episode relating to Waynesboro and thereafter, is without *any* connection with the Petitioner, and nothing is in the evidence that can connect her with any conspiracy touching thereon. It is the only evidence in support of Count II.

The "evidence" adduced to connect her with Count I fares no better as pointed out hereinabove. The evidence demonstrates no more than that the Petitioner took a Cigarette boat registered to her to Fillingham at the gulf coast and through a request by Girtman caused his boat to be towed by a vehicle registered to her to the same place. *This was done without the knowledge of their intended use to allow Petitioner to have conspired, in that the necessary knowledge of that unlawful act was absent together with an intent to do that unlawful act.*

See: *U.S. v. Binetti,* 547 Fed. 2d 265 (5th Cir. 1977); *U.S. v. Reynolds,* 511 Fed. 2d 605 (5th Cir. 1975).

The meager circumstances testified to in surrounding the Petitioner are so uncertain and indefinite that they fail to constitute lawful circumstantial evidence. Compare: *U.S. v. Diaz,* 515 Fed. 2d 892 (5th Cir. 1975), cert. den. 423 U.S. 1052.

Because there is nothing to negate the premise that the Petitioner, upon learning of the proposed conspiracy, declined to enter or withdrew, the conviction cannot stand. Absolutely no act is attributed to her upon her arrival at the gulf coast to support her entry into or attempt to further the objectives of the conspiracies charged.

The circumstances constituting the "circumstantial evidence" of this case must be found to be so strong that in effect it would not only be consistent with guilt but also inconsistent with a reasonable hypothesis consistent with innocence. *U.S. v. Garza,* 426 Fed. 2d 949 (5th Cir. 1970).

The circumstances are not near so damning or reflective of guilt as the circumstances which resulted in reversal of the Defendant in *Thomas v. U.S.,* 398 Fed. 2d 531, or *Roberts v. U.S.,* supra, (5th Cir. 1967).

The Petitioner duly and timely objected to statements of the co-defendant, without first having demonstrated she was a conspirator, but the court allowed these statements into evidence on the premise of a connection of the Petitioner to the defendants would subsequently be evidenced by the proofs. Such never occurred. Charges of conspiracy are not permitted to be established through pyramiding inference upon inference. *Direct Sales Company, Inc. v. U.S.,* 319 U.S. 703 (1943). Further, to establish that intent is essential to a conviction for conspiracy, the evidence of knowledge must be clear and not equivocal for without that knowledge there can be no intent. *Ingram v. U.S.,* 360 U.S. 672, 680 (1959).

In the instant case, Petitioner contends that her conviction is predicated upon a piling of inferences in the favor of the government and against the required presumption of innocence. The fact is that the circumstances established by the record simply reveal that Petitioner went from Miami to Mississippi

without being armed with adequate facts to have been in a posture to join in any existing conspiracy. Upon arrival in Mississippi she is never demonstrated to have been in circumstances adequate to have apprised her of the conspiracy; no acts on her part thereafter were subject to any proof, thus the evidence is wholly insufficient upon which her conviction be based.

CONCLUSION

WHEREFORE, in light of the foregoing circumstances and authorities cited therein, the Petitioner respectfully requests the judgment of the lower court be reversed and this Court issue a Petition for Writ of Certiorari.

Respectfully submitted,

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Telephone: (305) 467-6767

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530, this 20 September 1978.

BY: _____
RAY SANDSTROM

APPENDIX

1. Decision of the Court of Appeals
Fifth Circuit
A-1 to A-3

2. Petition for Rehearing denial
filed with the Fifth Circuit
A-4 to A-5

3. Stay of Mandate
Issued by Fifth Circuit
A-6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5773
Summary Calendar*

DO NOT PUBLISH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CAROL AMEND,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

(July 6, 1978)

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

Defendant Carol Amend was convicted on one count of conspiring to import, and one count of conspiring to distribute and to possess with the intent to distribute marijuana, in violation of 21 U.S.C. §§ 841 (a) (1), 952 (a) and 963. The sentences on the two counts are to run concurrently. On appeal defendant contends that evidence acquired during an illegal search and seizure was improperly admitted, and that the evidence was insufficient to establish her participation in the conspiracy. We affirm.

We need not consider whether the search of Thomas Swann's rented van and seizure of the marijuana contained therein was unlawful,[1] as we conclude that defendant has no standing to raise a Fourth Amendment challenge. Defendant

was not present when Swann's van was searched, she had no legitimate interest in the truck or its contents, and was not charged with an offense that includes, as an essential element, possession of the seized evidence at the time of the contested search and seizure. See: *Brown v. United States*, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569 (1973); *United States v. Archbold-Newball*, 5 Cir., 1977, 554 F. 2d 665, 678-79, *cert. denied*, ___ U.S. ___, 98 S.Ct. 644 (1977).

Defendant's sufficiency of evidence claim is equally without merit. The testimony of Charles Girtman, a co-defendant who pled guilty to a lesser included offense, established that defendant knew of the plan to import marijuana, and recruited Girtman to participate in the conspiracy. Girtman's testimony also revealed that defendant was present on the dock where the bales of marijuana were being unloaded. One of the motorboats used in the unloading was owned by defendant, and two of the vehicles employed to transport the marijuana also belonged to her. Taking the evidence in the light most favorable to the Government, see *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942), it is apparent that there was sufficient evidence to establish defendant's participation in the conspiracy. See, e.g., *United States v. Bolts*, 5 Cir., 1977, 558 F. 2d 316, 325 *cert. denied*, ___ U.S. ___, ___ S.Ct. ___ (1978).

AFFIRMED.

Footnote

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York*, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

1 Thomas Swann, the driver of the van, has contested the legality of this search and seizure in *United States v. Swann*, 5 Cir., ___ F. 2d ___ [No. 77-5499, ___ ___, 1978], the decision of which is pending.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5773

COURT OF APPEALS
FILED
AUG 21 1978
WARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

CAROL AMEND,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING
(August 21, 1978)

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby "denied".

ENTERED FOR THE COURT:

/s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

Form 703-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5773
Summary Calendar

D. C. Docket No. E76-(10R)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CAROL AMEND,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 6, 1978

Issued As Mandate:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

August 22, 1978

Mr. Ray Sandstrom
Attorney at Law
429 South Andrews Avenue
Fort Lauderdale, FL 33301

No. 77-5773 - U.S.A. vs. CAROL AMEND

MANDATE STAYED TO AND INCLUDING SEPTEMBER 21, 1978
(ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Clara F. Sachs
Deputy Clerk

enc.

cc Mr. James B. Tucker

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

COURT OF APPEALS
FILED
AUG 22 1978
EDWARD W. WADSWORTH
Clerk

No. 77-5773

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CAROL AMEND,

Defendant - Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi

ORDER:

( ) The motion of APPELLANT
for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(xx) The motion of APPELLANT
for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 21, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including
under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

s/ ROBERT A. AINSWORTH, Jr.
UNITED STATES CIRCUIT JUDGE